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Supreme Court of the United States

OCTOBER TERM, 1965

No. 786

SOCIEDAD MARIO MERCADO E HIJOS, *Appellants*

v.

COMMONWEALTH OF PUERTO RICO, ETC., *Appellee*

Appeal From the Supreme Court of Puerto Rico

BRIEF IN OPPOSITION TO APPELLEE'S MOTION TO DISMISS

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TO THE HONORABLE COURT:

Appellant through its undersigned attorneys respectfully submits the following brief in opposition to the motion to dismiss filed by appellee.

STATEMENT OF FACTS

The facts are properly and correctly stated in the Jurisdictional Statement filed by appellant dated November 30, 1965.

JURISDICTIONAL ISSUES RAISED BY APPELLEE'S MOTION

The issues raised by the motion to dismiss are frivolous and have no support on the law or in the cases cited by appellee. The case before this Honorable Court presents Federal questions that could not and cannot be dismissed on an estoppel alleged to have been incurred by appellant, as a result of having withdrawn the funds deposited in court while the case was still pending a hearing before the trial court.

Appellee and the Supreme Court of Puerto Rico, which was the court to raise the issue for the first time on appeal, have overlooked the following facts:

1. The case was before a court of law and not before a jury or assessors as is the case in most of the States.

2. There had been no award for compensation or damages in the case.

3. The motion was conditional and expressly saved the issues raised by appellant in its answer.

4. There was no acceptance of money deposited as compensation for the land taken.

5. Government's counsel made no objection to the motion as drawn.

6. The alleged estoppel, if there is any, is not by itself sufficient to support the judgment of the Supreme Court of Puerto Rico as to all the issues involved.

In Puerto Rico, condemnation proceedings are conducted by filing a complaint before the court of law (General Law of Eminent Domain of March 12, 1903,

as amended). There is no jury or assessors. The judge presiding the court hears the evidence and determines the amount to be paid the owner as just compensation. As a court of law, rulings are made on all constitutional and law issues raised by the parties. The court administratively, upon motion by the condemnor without hearing the condemnee, transfers title to the property on the condemnor and orders that he be given immediate possession of the condemned land by the court's officers. That is the reason why the statute allows, and that is the established practice in the trial court, the condemnee to withdraw the funds deposited with the court without prejudice to his allegations and before final award is made.

It cannot seriously be stated that a motion filed under such circumstances constitutes an acceptance of the sum paid and acts as a waiver of the issues. The record shows that after the withdrawal there was a long hearing as to the amount to be paid and where the constitutional questions were again raised. The conduct of appellant throughout the whole proceedings reveals its clear intention not to waive any issues at all.

Let us analyze the most important cases cited by appellee in its motion:

In Nichols on Eminent Domain, Vol. 6, at page 419, it is stated following the citation made by appellee:

> "In States in which condemnation proceedings are judicial, as the issue of the validity of the taking is determinable in the proceedings themselves, and usually before the question of compensation is passed upon, and the owner is not obliged to file any claim for damages, this question does not ordinarily rise; but it has been held that if the owner goes to trial on the question of damages he cannot,

> on motion for a new trial set up an informality in the preliminary adjudication upon the validity of the taking. When the taking is effected by administrative order, an owner who wishes more compensation than that he has been awarded must file a claim, while the petition for damages assumes the validity of the taking, it does not, according to the sounder rule, preclude the owner from contesting the validity of the taking in separate proceedings."

On page 177, sec. 26.31, it is stated:

> "Generally, where the owner of the property fails to interpose objections to the petition and proceeds with the hearing on the question of compensation, he is deemed to have waived any objection which might properly have been asserted and he may not thereafter assert such objections." (Nichols on Eminent Domain).

The case cited by appellee of *Winslow* v. *Baltimore & O. R. Co.* is not applicable, in the first instance, because in that case the petitioners were asking the court to order the respondent to take more land than they had condemned and alleged that the condemnor had not the authority under the acts (31 Stat. 774 and 32 Stat. 912) to condemn only part of the land; and second, because this objection was raised after the petitioner had accepted as the appraised damages the sum awarded by three persons appointed by the court, which award was confirmed by the court, for the land actually condemned.

The court stated:

> "We think that the position which they now occupy, in place of that which they have abandoned, is untenable. *This proceeding has been allowed to reach its end* (italics supplied). The condemna-

> tion which the petition sought to have made has been made. The land described in the petition *has been appraised,* the compensation to be paid has been deposited with the court and received by the owners."

The court proceeded to consider the entire matter "functus officio."

The case of *Great Falls Mfg. Co.* v. *Atty. General,* 124 U.S. 581, is not applicable. In that case the court stated at page 598:

> "These questions are of great interest, and their examination, in the light of the authorities, might not be altogether unprofitable. But this opinion need not be extended for the purpose of such an examination, for the questions propounded are not material in the determination of the present case. They have become immaterial by the act of the plaintiff in instituting suit against the United States in the Court of Claims. In that suit compensation was sought for its property taken for public use, *while the present suit* (italics supplied) proceeds upon the ground that it has not been lawfully taken, and that it is entitled to be placed in possession thereof. Congress prescribed a particular mode for ascertaining the compensation which claimants of property taken for the purposes taken in the act of 1882 were entitled to receive. It gave them liberty to proceed by suit against the United States before a designated tribunal which, since the passage of the act of March 17, 1866, 14 Stat. 9, has exercised 'all the functions of a court,' from whose judgment appeals regularly lie to this court. United States v. Klein, 13 Wall. 145; United States v. Jones, 119 U.S. 477; Gordon v. United States, 117 U.S. 697. The plaintiff by adopting that mode, has assented to the taking of its property by the government for public use, and has agreed to submit the determination of

> the question of compensation to the tribunal named by Congress . . . "

The case of *Williams* v. *City of La Grange*, 98 S.E. 2d 617, is also inapplicable. In that case condemnation proceedings were involved under the laws of the State of Georgia. The General Assembly of Georgia affords the owner of property to be condemned certain rights in fixing the value of his property, such as that of appointing an assessor, to offer evidence, and to appeal from the award of the assessors to a jury. The sole question which may be passed upon by the appointed assessors or by a jury on appeal is the amount of compensation to be paid to the owner. The Legislature has not expressly provided any method whereby the property owner can contest the question of public necessity or the right of condemnation. The property owner has no remedy except an independent action in a court of equity for relief.

In that case Williams participated in the designation of an assessor on his part and after the award was made and deposited in the court he refused to receive it. He then sued the City of La Grange in a court of equity for relief to enjoin the condemnors. The Supreme Court, Troup County, entered judgment sustaining plea of estoppel and dismissing the petition. The Supreme Court of Georgia reversed and stated at page 621:

> "This court has held in several instances, that if a property owner accepts the award made by the assessors he is estopped. This is unquestionably correct, for obviously one cannot voluntarily accept the money awarded for his property and still contest the right to condemn. The three Justices in ruling that the petitioners in the Fountain case

were estopped followed those cases by holding that payment of the award into court upon refusal of the owner to accept was the legal equivalent of payment, citing in support thereof Code, Sec. 36-602. Clearly, the import of that is that payment into court is equivalent of payment to the owner only insofar as the right to enter upon the property and prosecute the work is concerned. It is not the equivalent of acceptance of the award by the owner nor of payment to him insofar as it affects his right to pursue his remedy in equity."

The case of *Swan Boulevard Development Corporation* v. *Cybulski,* 109 N.W. 2d 671, is not applicable to the facts of this case and its issues. In that case Swan accepted $38,000 of the total award made of $48,000 for a piece of property condemned under the Kline Act of Wisconsin. The money was used by him to pay a mortgage on the property on which it had defaulted and an action for foreclosure was started by the mortgagees. There was a stipulation entered into between the City of Milwaukee (condemnor), Swan and the mortgagees for the withdrawal of the money on deposit with the Clerk of the Circuit Court. Later he filed another motion with the court for payment of the balance.

The court, citing Nichols on Eminent Domain, stated that "an owner of land taken by virtue of eminent domain proceedings who has accepted and been paid the award of damages cannot afterwards contest the validity of the taking either directly or collaterally, or seek to recover or retain possession of his land, no matter how fundamental the defect in the proceedings may be. The acceptance of the amount of $38,000 whether by stipulation or not, is inconsistent with the application for a writ of certiorari which attacks the validity of the very proceedings which determined the award.

It is clear that in this case there was a voluntary acceptance which is the equivalent of a contract to sell or voluntary sale.

The case cited in *Re Condemnation of Land,* 176 S.W. 532, is not applicable. In that case the owner attacked the jurisdiction of the division of the court that tried the case. They raised the issue that the notice stated that the jury would be empanelled at Division No. 1 not at Division No. 2 where the case was finally heard. Later they accepted the money awarded in the judgment and used it to pay assessments made on their property by the City of Kansas. They appeared before the Treasurer of the City and executed an assignment of part of the money awarded as damages in the condemnation as an offset against the amount due by them. They specifically designated the lots to be credited with the payment.

The court stated at page 532:

> "This was a clear and unequivocal acceptance of the benefits of the judgment and a recognition of its validity."

The appellee in this case is trying to circumvent the federal questions involved in this appeal by raising for the first time a so called estoppel and stating that this question of whether the appellant is in estoppel changes the issue into one of local law. Appellee relies on a case that is not applicable. In the case of *Enterprise Irrigation District* v. *Farmers Mutual Canal Co.,* 242 U.S. 157, this Honorable Court was concerned with a judgment based upon two grounds, one involving a federal question and the other not. The non-federal question was the defense of estoppel in pais raised by the Canal Company in the case.

With reference to this defense of estoppel the State Supreme Court had said in deciding the issue for the Canal Company, that "it would be contrary to the plainest principles of equity if plaintiffs might stand silently by, seeing the defendant engage in such a monumental work under claim of right, and utter no word of warning as to their own claims, which, if eventually established, would deprive defendants of the water which the canal was built to carry, condemn the whole enterprise to failure and result in the absolute loss of the money expended. It would be manifestly unjust to allow the plaintiffs after the works were practically finished and the money expended, to insist upon claims which, had they been asserted in good time, would at least have put the defendants upon their guard and have given them cause to pause and hesitate in their expenditures until the validity of their title had been determined." (243 U.S. 163-164; 61 L. Ed. 648).

In other words, the State Supreme Court disposed of the case which had been submitted by stipulation of the parties on the basis of the defense of estoppel in pais. This was clearly a non-federal question.

This Honorable Court, at page 164 (243 U.S.) says:

> "In such situations our jurisdiction is tested by inquiring whether the non-federal ground is independent of the other and broad enough to sustain the judgment. Where this is the case, the judgment does not depend upon the decision of any Federal question and we have no power to disturb it."

Further on, this Honorable Court states at page 164 (243 U.S.; 61 L. Ed. p. 649):

> "But where the non-federal ground is so interwoven with the other as not to be an independent

> matter, or is not of sufficient breadth to sustain the judgment without any decision of the other, our jurisdiction is plain."

Referring to the State Supreme Court Decision, this Honorable Court states:

> "In taking up the question of estoppel, as also in concluding its discussion of the subject, the court plainly shows that it is then indulging an assumption that the other ground is not tenable."

Further on this Honorable Court says (page 165):

> "and it may be well to add that the question did not originate with the court. It was presented by the pleadings, was in the mind of the parties when the stipulation was made and was dealt with by counsel and court as a matter of obvious importance."

Are those the facts in the present case? Certainly not. In the present case no such situation was present. The whole case is based on Federal questions properly and timely raised before the trial court and at the Supreme Court of Puerto Rico. The issue of estoppel which appellee tries to raise as non-federal question has to do with the motion to withdraw funds that was filed by appellant with the trial court on February 13, 1961. (Exh. D, Jurisdictional Statement, p. 14a). Such motion in its paragraph 2 states:

> "2. That defendant wishes to *withdraw the aforesaid sum without prejudice to its allegations in this case.*" (emphasis supplied).

This motion was granted by the trial court and no objection to its terms were made by opposing counsel. (Exh. D, Jurisdictional Statement, p. 15a). When the

motion was filed and granted there had not been entered a final award in the case. The allegations to which the motion refers are the issues raised in its answer to the complaint (Exh. C and Exh. DD). One of them refers to the value of the land condemned and the special or legal defenses have to do with Federal questions.

The alleged issue of estoppel was never raised in the pleadings or in the case by the parties. It was the Supreme Court of Puerto Rico, which raised it in its ruling on a petition of certiorari filed by appellant on the issue of discovery under the rules of Civil Procedure of Puerto Rico. The court says:

> "But be as it may, petitioner in this appeal is estopped at this stage of the proceedings from raising the defense we have discussed, since an examination of the record reveals that the withdrawal of the amount deposited by the State as just compensation was sought and the corresponding check for the sum of $121,827.40 was actually drawn in favor of the corporation. This being so, the acceptance by respondent of the amount deposited precludes him from arguing any other issue which does not relate exclusively to the amount of compensation." (Exh. H, Jurisdictional Statement, p. 31a).

The Supreme Court of Puerto Rico made the statement as a dictum in an issue not before it at the time. In its order of May 27, 1965 the Supreme Court of Puerto Rico held that the constitutional questions were waived by the withdrawal of funds. (Jurisdictional Statement, p. 66a).

On this point we wish to point out that the first constitutional question raised in the Notice of Appeal filed with the Supreme Court of Puerto Rico (Exh. M, Jur-

isdictional Statement, p. 61a) was that the judgment appealed from deprived appellant of its property without proper compensation. The notice also raised the issue of public use.

Appellant holds that the issue raised by appellee has no merits. The fact that appellant withdrew the funds pending the final award in the case as to all the issues raised in the answer, cannot have the far reaching effect of converting all the Federal questions involved in the case into one of local ground and preclude appellant from a hearing before this Honorable Court. This is trying to abide by a technicality in the legal process. It is more fair to state that it is appellee who is estopped from raising the issue now before this Honorable Court. Appellee made no objection to the motion of withdrawal of funds and made no issue of it thus inducing appellant into error if there was such.

Furthermore, this issue of estoppel cannot have the effect of converting the Federal questions into a local one by which the whole judgment issued in the case can be sustained.

The motion of appellee should be denied by this Honorable Court.

Ponce, Puerto Rico, this 29 day of January, 1966.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I Certify: That on this same date I mailed, post paid, a copy of this brief in opposition to Mr. J. B. Fernandez Badillo, Solicitor General of Puerto Rico, to his address in San Juan, Puerto Rico. That there is a regular and daily mail service between this city of Ponce and the City of San Juan, Puerto Rico, operated by the Federal Government.

Ponce, Puerto Rico, this 29 day of January, 1966.

CHARLES CUPRILL OPPENHEIMER
One of the attorneys
for Appellant.